

The Malayan Law Journal

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NOTES.

THE MALAYAN LAW JOURNAL appears again after four years of suppression.

The Editor regrets that the Journal could not be published at a time when perhaps it was most needed; when the rule of law was being replaced by the rule of the Gestapo and of the Police; when the Prisons were becoming death dungeons; when in the Courts the concepts of British Justice were tottering in the balance; and when the tenets of an honourable profession were in grave danger of collapsing.

It is typical of the Japanese occupiers that they should have carried on the outward form and the letter of the law they found here while neglecting its spirit and its essence. Here too as in other spheres, they paid no attention to the question of maintenance. The machinery of the law was drained off its strength, but no effort was made to build up that strength.

The Japanese occupation was in truth a negation of the rule of law. We have seen the concentration of Chinese citizens and the removal of hundreds and thousands of them for a purpose which even now is

not yet clear; we have seen the assaults and insults meted out to innocent people; we have seen the horrible spectacle of heads, displayed in all their ugliness, blood and frozen looks of agony and fear in public places; we have seen the fear and uncertainty instilled into the daily lives of respectable citizens by the fear of the Japanese Military Police and we have heard of and seen the tortures meted out to so-called political prisoners and have heard of the brutal murder of many of them. It was in truth a rule of fear in all its horrible reality.

We return again to a world not yet entirely free from war and rumours of war—but to a world in which any individual can breathe freely and meet his accusers without fear. The rule of law has returned and with it the MALAYAN LAW JOURNAL has returned to carry on its work of upholding, explaining and expounding the law and maintaining its high traditions.

Powers and Duties of an Enemy Occupant. On the 8th day of November 1945 the British Military Administration, Malaya (Singapore Division) issued a proclamation "to provide for setting aside convictions by tribunals exercising jurisdiction during the Japanese occupation of the Settlement of Singapore." This proclamation was in addition to the Order issued on the 3rd day of November 1945 and made under Sub-section (4) of Section 23 of the Military Courts Proclamation which quashed the convictions and sentences of persons convicted by tribunals exercising jurisdiction during the Japanese occupation of the Settlement of Singapore and undergoing sentences awarded by such tribunals. The joint effect of the Order and of the Proclamation is to set aside all convictions made by the Criminal Courts during the Japanese occupation of Singapore.

The question naturally arises, What then are the rights of an occupying belligerent? It is assumed that the Japanese were in occupation of Malaya. Occupation is defined by Oppenheim as "invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent by the fact that an occupant sets up some kind of administration, whereas the mere invader does not." The question whether the whole or a particular part of the territory of a State has been occupied or not is a question of fact but once the fact of occupation is established, that fact gives rise to certain legal rights and duties. "The occupant" says Professor Hyde in International Law Vol. 2 p. 690

"enjoys the right and is burdened with the duty to take all the measures within his power to restore and insure public peace and order."

We begin with an important principle and that is that occupation does not displace or transfer sovereignty. The occupant is entitled to exercise military authority over the territory occupied, but he does not acquire sovereignty unless and until it is ceded to him by a treaty of peace or is simply abandoned in his favour without cession or is acquired by him by virtue of subjugation, that is extermination of the local sovereign and annexation of his territory. So too occupation does not operate to cause any change of nationality upon the inhabitants and no transfer of allegiance. The occupant only acquires a right against inhabitants who remain that they should obey his lawful regulations for the administration of the territory and the safety of his forces. The occupant's right and duty of administering the occupied territory are governed by international law. Article 43 of the Regulations respecting the Laws and Customs of War on Land annexed to the Hague Convention IV declares the existing law as follows:—

"The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting unless absolutely prevented, the laws in force in the country."

There is as yet no British judicial authority for a statement of the powers of an enemy occupant, but as the Hague Conventions have been ratified by Great Britain, it would seem that the principle underlying them would be adopted by the Courts. This is borne out by the statements of textbook writers. W. E. Hall in *International Law* (8th Edition) p. 579, speaking of the right of postliminium, says:— "Thus judicial acts done under (the control of the occupant), when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control and the various acts done during the same time by private persons under the sanction of the municipal law remain good. Were it otherwise, the whole social life of a community would be paralysed by an invasion (that is, occupation); and as between the state and individuals the evil would be scarcely less—it would be hard for example that payment of taxes made under duress should be ignored, and it would be contrary to the general interest that sentences passed upon criminals should be annulled by the disappearance of the intrusive government." Similarly Oppenheim in his chapter on Postliminium (*International Law* Vol. 2

Section 282) says "If the occupant has collected the ordinary taxes, has sold the ordinary fruits of immovable property, has disposed of such movable State property as he was competent to appropriate or has performed other acts in conformity with the laws of war, this may not be ignored by the legitimate sovereign after he has taken possession of the territory. However this only extends to acts done by or under the authority of the occupant during the occupation."

McNair in his "*Legal Effects of War*" (1944) p. 335 admirably sums up the position as follows:— "Whether the territory under occupation is British or belongs to a co-belligerent with Great Britain or Great Britain is neutral, the principle is that, the occupant being under a duty to maintain order and to provide for the preservation of the rights of the inhabitants and having a right recognised by international law to impose such regulations and make such changes as may be necessary to secure the safety of his forces and the realisation of the legitimate purpose of his occupation, his acts, whether legislative, executive or judicial, so long as he does not overstep these limits will be recognised by the British Government and by British Courts of law—during and after the war if Great Britain is neutral, after it if Great Britain is belligerent."

Thus we apprehend that if the enemy were to occupy the Scilly Isles, all the ordinary transactions of private law taking place in accordance with existing English law during the enemy administration such as contracts, dispositions of movables and immovables, devolution of property by will or upon intestacy, and all normal official transactions such as the collection of ordinary taxes, would at the end of the occupation, be treated as valid, and all judgments, civil and criminal, given in accordance with English law or with such regulations as the enemy was lawfully entitled to prescribe, would be respected." He adds in a footnote "In regard to convictions for offences, it seems necessary to exclude from this statement any unexpired result of convictions for offences against the security of the occupant and his troops and any political offences directed against him. But I can see no reason why a conviction for an offence against a rationing system or against a prohibition of profiteering imposed by the occupant in the interest of the community as a whole should not in principle continue to have effect after the end of the occupation. The Peace Treaty may, of course, expressly deal with this matter."

The acts of the occupant will however be recognised only if he acts within the scope of the

authority permitted to him by international law. If the occupant acts unlawfully, his measures will not receive that recognition.

During the Japanese occupation of Singapore, although there were no changes in the criminal law (apart from what the Japanese occupants considered war offences) there were important changes in procedure. The Maintenance of Public Peace and Order Law, for example, gave judges power to look at Investigation Papers. It cannot be denied too that the methods of the Military Police and of the Military Administration Police were not conducive to the giving of a fair chance to accused persons. It is for this reason, we assume, that the convictions during the Japanese occupation have been quashed. In the words of the Order dated the 3rd November 1945 "it appears that persons tried for offences were not afforded proper and adequate safeguards to ensure their fair and impartial trial and that the treatment of such persons before or during trial offended against fundamental principles of the administration of justice."

We may add that as far as we have been able to ascertain none of the Police Magistrates who were officiating in Singapore did in fact refer to the Investigation Papers in the trial of cases before them. This however does not affect the question for it is essential that justice should seem to be done. The mere possibility that the Investigation Papers can be referred to is enough to make the position unfair to accused persons.

The man - in - the street. The Man-in-the-Street is puzzled!

Prior to the advent of the Jap, British Justice to him was an inexorable flood which slowly and surely levelled all before it and was no respecter of persons whatever their ranks or callings.

During the Jap occupation, one only had to have money or "influence" to be treated above what passed for law. But throughout that dark period, the Man-in-the-Street retained his faith in British Justice and fair play and awaited with patience the inevitable overthrow of the Jap invaders.

The British returned and the Malayan Security Service set about the task of detaining suspected Jap collaborators. The Man-in-the-Street began to sit up and take note.

"What is the definition of collaboration?", he asked. He was told, via the Special Courts Pro

clamation, that a collaboration offence meant an offence under the Treason Act 1351, the Penal Code Secs. 121B, 121C and 122, the Sedition Ordinance 1938 Sec. 4, the War Offences Ordinance 1941 Sec. 3, and Regulation 31 of the Defence Regulations 1939.

The Man-in-the-Street was content. He has been taught and he accepts the fact that laws have always been framed for the good of the community—let the inexorable flood of British Justice take its course.

Then a jolt. Something goes wrong with that flood. The Man-in-the-Street is told of releases and discharges of men and women suspected of treason, sedition and treachery. His faith in British Justice and fair play is nevertheless strengthened.

He tells himself, "I have been through the mill of degradation and psychological debasement. I cannot paint a word picture of conditions during Jap regime. But the Authorities must understand else they would never arrest that inexorable flood which I know so well. How refreshing to be the subject of Justice tempered with fair play and mercy!"

The Man-in-the-Street becomes his own Judge. He divides suspected collaborators into two classes. To the first class he assigns those people *prima facie* guilty of treasonable or seditious acts or utterances which have done harm to nobody, let alone the British or Allied cause. To the second class, he assigns those people *prima facie* guilty of collaboration offences which in fact resulted in harm to members of the community and/or the British or Allied cause. He smiles to himself and says "All members of the first-class will be released or discharged, all members of the second class will have to stand their trial—the Authorities cannot fool me!" To him, that "inexorable flood" must engulf the second class and follow its course slowly and surely to the ultimate dividing "seas" of "acquittals" or "convictions."

He is mistaken. A whirlwind seizes upon members of both classes and without more ado he reads and is told of releases and discharges of men or women fortunate enough to be caught and lifted out of that "inexorable flood", leaving their less fortunate brethren to face what may befall them within the letter of the law. What is it all about? He has never known British Justice seemingly making "fish of one and meat of another". He yearns for the enunciation of a clear-cut policy by the Authorities. Can he get it?

The Man-in-the-Street is puzzled!